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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/694,198

Filing Date: October 27, 2003

Appellant(s): KEISER, DENNIS L.

James F. Herkenhoff
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 8/4/09 appealing from the Office action mailed 2/2/09.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

GROUNDS OF REJECTION NOT ON REVIEW

The following grounds of rejection have not been withdrawn by the examiner, but they are not under review on appeal because they have not been presented for review in the appellant's brief: the rejection of claim 3 under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Application Publication No. 2002/0086774 to Warner in view of U.S. Patent No. 4,846,466 to Stima III; the rejection of claim 4 under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Application Publication No. 2002/0086774 to Warner in view of U.S. Patent No. 4,730,829 to Carlson; the rejection of claim 6 under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Application Publication No. 2002/0086774 to Warner in view of U.S. Patent No. 4,846,466 to Stima III as

applied to claim 3, and further in view of U.S. Patent No. 6,231,481 to Brock; and the rejection of claim 7 under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent Application Publication No. 2002/0086774 to Warner.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

2002/0086774	Warner	7-2002
6,231,481	Brock	5-2001
6,672,157	MacFarlane et al.	1-2004

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1, 2, 8, 9 and 13 - 15 are rejected under 35 U.S.C. 102(e) as being anticipated by U.S. Patent Application Publication No. 2002/0086774 to Warner.

In regard to claims 1, 2, 8, 9 and 13 - 15, Warner discloses initializing a resistance element to a first resistance level; moving an engagement assembly coupled to the resistance element at a highest achievable velocity through an exercise stroke; measuring a representative velocity at which

the engagement assembly is moved through the exercise stroke and collecting data responsive to the representative velocity [0033][0035]; increasing the resistance level of the resistance element [0282]; repeating the acts of moving, measuring and increasing until sufficient data are collected; calculating power for each exercise stroke based on the resistance level for each exercise stroke and the representative velocity for each exercise stroke; generating an output that represents at least the measured velocity and calculated power for a plurality of exercise strokes (Figure 8c); and determining a maximum power (600) for the muscle group [0307][0308]. Sufficient data is collected when the resistance level is incremented to a predetermined level. Sufficient data is collected when a predetermined number of exercises are completed. Power is calculated at the maximum resistance (Figure 8c). The resistance element provides a generally consistent resistance against movement of the engagement assembly throughout the exercise stroke. The velocity and resistance level where the maximum power is produced is determined in that all data for a workout session is recorded [0303]. The maximum velocity at which the engagement assembly is moved during a plurality of exercise strokes is determined in that all data for a workout session is recorded [0303].

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 5, 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S.

Patent No. 6,672,157 to MacFarlane et al. in view of U.S. Patent No. 6,231,481 to Brock.

In regard to claims 1, 8 and 9, MacFarlane et al discloses a method of evaluating the power of a muscle group of a including initializing a resistance element to a first resistance level; moving an engagement assembly coupled to the resistance element at a highest achievable velocity through an exercise stroke; measuring a representative velocity at which the engagement assembly is moved through the exercise stroke and collecting data responsive to the representative velocity; increasing the resistance level of the resistance element; repeating the acts of moving, measuring and increasing until sufficient data are collected; calculating power for each exercise stroke based on the resistance level for each exercise stroke and the representative velocity for each exercise stroke; and determining a maximum power for the muscle group (Col. 10, line 50 – Col. 11, line 67).

MacFarlane et al teaches to stop the exercise stoke once a leg was tested three times, so this could be viewed as a predetermined number of exercise strokes. Also MacFarlane et al teaches to stop at a specific resistance level, so this could be viewed as a predetermined resistance level. MacFarlane fails to disclose generating an output that represents at least the measured velocity and calculated power for a plurality of exercise strokes. However, Brock teaches a method of evaluating the power of a muscle group including generating an output that represents at least the measured velocity and calculated power for a plurality of exercise strokes (Col. 4, lines 2 – 5; 54 – 62). It would have been obvious to one having ordinary skill in the art at the time the invention was made to include generating an output that represents at least the measured velocity and calculated power for a plurality of exercise strokes as taught by Brock with the method disclosed by MacFarlane et al. in order to assist a user in maximizing or optimizing his efforts (Col. 3, lines 18 – 19).

Regarding claim 5, MacFarlane et al. in view of Brock disclose giving the subjects a good 20 – 30 second rest between trials, but fails to disclose the time between the act of measuring increasing as the resistance level increases. However, it would have been obvious to one having ordinary skill

in the art at the time the invention was made to modify the method of MacFarlane et al. in view of Brock, with a step of allowing the user to rest for an increasing amount of time as the strain of the exercise increases before attempting a new resistance level, to allow for accurate and valid power testing results to be obtained.

(10) Response to Argument

Appellant's arguments have been fully considered but they are not persuasive. Appellant asserts that neither Warner nor MacFarlane disclose "moving an engagement assembly coupled to the resistance element at a highest achievable velocity through an exercise stroke" and subsequently determining "a maximum power for the muscle group". Additionally, Appellant asserts that Warner teaches away from the claimed method. However, "[a]rguments that the alleged anticipatory prior art is nonanalogous art' or teaches away from the invention' or is not recognized as solving the problem solved by the claimed invention, [are] not germane' to a rejection under section 102." *Twin Disc, Inc. v. United States*, 231 USPQ 417, 424 (Cl. Ct. 1986) (quoting *In re Self*, 671 F.2d 1344, 213 USPQ 1, 7 (CCPA 1982)). A reference is no less anticipatory if, after disclosing the invention, the reference then disparages it. The question whether a reference "teaches away" from the invention is inapplicable to an anticipation analysis. *Celeritas Technologies Ltd. v. Rockwell International Corp.*, 150 F.3d 1354, 1361, 47 USPQ2d 1516, 1522-23 (Fed. Cir. 1998). The Examiner considers both Warner and MacFarlane to disclose "moving an engagement assembly coupled to the resistance element at a highest achievable velocity through an exercise stroke" and subsequently determining "a maximum power for the muscle group". The Examiner considers the highest velocity recorded during the exercise set to be the highest achievable velocity through an exercise stroke in that it was the highest velocity achieved. The maximum power calculated is "a maximum power for the muscle group". Although Warner teaches keeping a constant pace, it is common knowledge that during a

normal weight lifting workout, that the first few repetitions in a set are done relatively easily and at a velocity greater than the last rep of the set. Normally, the last rep of the set, just prior to muscle failure, is finished at a speed substantially slower than the first rep. However, this velocity is the "highest achievable velocity" at the time of the last rep. The limitation "highest achievable velocity" is a relative and subjective term. Every individual has a highest achievable velocity for a given exercise that can vary greatly depending on the day, time of day, number of sets and repetitions performed during the exercise. The Examiner's interpretation of what is a "highest achievable velocity" (i.e. the highest velocity achieved) is a broad but reasonable interpretation. Appellant's disclosure fails to include any specifics directed to what Appellant considers to be a "highest achievable velocity" or how a "highest achievable velocity" is different from what the Examiner considers it to be. Furthermore, the disclosure fails to describe how Appellant knows whether or not a user actually reached their highest achievable velocity. In regard to the rationale provided by the Examiner to modify MacFarlane in view of Brock, Appellant asserts that the purported rationale taken from Brock is unrelated to the testing program of MacFarlane et al. which is intended to validate the accuracy of the power tester on different machines. However, the Examiner maintains that generating an output as taught by Brock would allow a user of the MacFarlane et al. method to maximize or optimize his efforts during the validation of the accuracy of the power tester on different machines.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Jonathan ML Foreman/

Examiner, Art Unit 3736

Conferees:

/Max Hindenburg/

Supervisory Patent Examiner, Art Unit 3736

/Tom Hughes/

TC 3700 TQAS

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.